

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY R. HORNE, Individually and as Next
Friend of SARA HORNE and ANDREA HORNE,
minors,

UNPUBLISHED
October 14, 2003

Plaintiffs-Appellants,

v

No. 240247
Oakland Circuit Court
LC No. 01-028974-NO

STRAWBERRY HILLS CORPORATION, ABS
PROPERTIES, INC, TRERICE TOSTO
COMPANY, and COLLIERS INTERNATIONAL
PROPERTY CONSULTANTS OF MICHIGAN,

Defendants-Appellees.

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendants' motion for summary disposition in this slip and fall case. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Timothy Horne,¹ a truck driver, was injured while making a delivery to Strawberry Hills on May 13, 1998. Plaintiff entered the store via the loading dock ramp, and asked where he should make his delivery. He was told to bring the merchandise through the back entrance. Plaintiff informed a store employee that the loading dock was wet from a recent rain, and could be slippery. He was told that the ramp would be taken care of.

After he loaded his dolly, plaintiff noticed that a sawdust-like material had been spread over the metal ramp. As he pulled the dolly backwards up the ramp, plaintiff slipped and fell. He discovered that the ramp was still wet underneath the sawdust material.

Plaintiffs brought this action alleging that defendants were negligent in failing to keep the ramp in a reasonably safe condition, and that the ramp did not comply with BOCA standards.

¹ For purposes of this opinion, "plaintiff" in the singular refers to Timothy Horne.

Defendants moved for summary disposition, asserting that the hazard was open and obvious. The trial court granted defendants' motion.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

A possessor of premises owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not generally encompass the removal of open and obvious dangers, unless special aspects of the condition make the risk unreasonably dangerous. *Id.* at 516-517. Special aspects may be present if the risk is unavoidable, or if there is an unreasonably high risk of severe harm. *Id.* at 518.

The test to determine if a danger is open and obvious is whether an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Where a risk is known to the invitee there is no duty to protect or warn the invitee unless the possessor should anticipate the harm despite the knowledge of it on behalf of the invitee. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

Although an average user of ordinary intelligence could find that a wet, sawdust coated metal ramp might continue to be slippery on later use, it is also reasonable to conclude that an average user of ordinary intelligence might believe that the ramp did not continue to present a danger where the slipperiness of the ramp appeared to have been corrected by defendants' employees after request. Plaintiff may have logically assumed that defendants' employees dried the ramp and added fresh sawdust, apparently making the ramp safe for use. Minimally, there are issues of fact as to whether the danger remained open and obvious after corrective measures were taken. Additionally, it is arguable that defendants should have anticipated the danger and that it was unavoidable, assuming that plaintiff had knowledge of it, where there was some evidence that plaintiff was directed by defendants to specifically use the back entrance for the delivery. See *Lugo, supra* at 518. The trial court erred in granting defendants' motion for summary disposition because genuine issues of material fact existed with respect to defendants' liability.

Reversed.

/s/ William B. Murphy
/s/ Kurtis T. Wilder